Supreme Court, U.S.
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80-844

IN THE

Supreme Court of the United States

DOCKET NO.

MARSHALL P. SAFIR, Petitioner
V.
MARVIN CHUDNOFF, Trustee in
Bankruptcy of Pioneer Warehouse Corp.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Including Appendix

MARSHALL P. SAFIR
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Questions Presented

Whether the bankruptcy court in the exercise of summary jurisdiction over the leasehold estate of a bankrupt and finding that the trustee has no right, title or interest thereto has the power to order forfeiture of the assigned chattels of the bankrupt, not in the courts possession and without the consent to the courts jurisdiction by the adverse claimant assignee.

Whether the savings provisions of the Bankruptcy Reform Act 1978 PL95-598 can be used by the bankruptcy court in disharmony and inconsistent with Congressional intent to reject ipso facto bankruptcy clauses (11 USC 363(L) and 11 USC 541 (c) (1) (B) to effect a forfeiture of a lease in a proceeding brought by the trustee for authorization to sell a lease after October 1, 1979.

Whether when the bankruptcy court makes the threshold decision that the bankrupt has no right, title or interest in a lease does the court's jurisdiction survive to an independent controversy which does not advance the purpose of 11 USC 702 (1970) "To cause the estates of bankrupts to be collected...and distributed."

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Bankruptcy Reform Act of 1978
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11 USC 363 (L)
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Title IV Sec. 403(a) 11 USC Prec. 101 note.

CITATIONS

Cline v. Kaplan 323 U.S. 97
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Thompson v. Dachner 214 F2d 922
Matter of Midtown Contracting 243 Fed 56
Cert Denied 245 US 654
Matter of Meiselman 105 F2d 995
In re Oceana International Inc. 376 F. Supp. 956 (1974)
Kaplan v. Guttman 217 F2d 481
Evarts v. Eloy 204 F2d 712
In re Prince 89 F2d 681
In re Berkowitz 143 F. 598
Tabor v. Robinson 36 BARB 483 (N.Y. 1862)
Godfrey v. State of N.Y. 201 NY 2d 649 (1960)
Antonowsky v. State of N.Y. 180 NYS 2d 966 (1958)
Matter of Eaton Factores 3 B.R. 20 (1980)

U.S. ex. rel. Hintopolous v. Shaughnessy 353 US 72 (1957)
Queens Blvd. Liquor v. Blum 503 F 2d 202 (1974)
Halkin v. Helms 26 FRS 2d 1019 (1977)
In re Pioneer Whse. Corp. 2 B.R. 1 (1979)
Safir v. Kreps 551 F 2d 447 (1977) Cert. denied 434 US 820
Safir v. Blackwell 579 (2d 742 (1979) Cert. denied 441 US 943

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

MARSHALL P. SAFIR, Petitioner

V.

MARVIN CHUDNOFF, Trustee in
Bankruptcy of Pioneer Warehouse Corp.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Filed November 25, 1980

Opinions Below

Petitioner prays that a Writ of Certiorari issue to review the judgements of the 2nd Circuit Court of Appeals entered in the above entitled case on May 12, 1980. Petition for rehearing en banc denied July 29, 1980. These opinions affirmed the decision of District Judge Eugene Nickerson of the order and decision of Bankruptcy Judge Goetz D.C.E.D. NY of December 6, 1979.

Jurisdiction

The Jurisdiction of this court is invoked under 28 USC. 1254(1)

Questions Presented

Whether the bankruptcy court in the exercise of summary jurisdiction over the leasehold estate of a bankrupt and finding that the trustee has no right, title or interest thereto has the power to order forfeiture of the assigned chattels of the bankrupt, not in the courts possession and without the consent to the courts jurisdiction by the adverse claimant assignee.

Whether the savings provisions of the Bankruptcy Reform Act 1978 PL95-598 can be used by the bankruptcy court in disharmony and inconsistent with Congressional intent to reject ipso facto bankruptcy clauses (11 USC 363(L) and 11 USC 541 (c) (1) (B) to effect a forfeiture of a lease in a proceeding brought by the trustee for authorization to sell a lease after October 1, 1979.

Whether when the bankruptcy court makes the threshold decision that the bankrupt has no right, title or interest in a lease does the court's jurisdiction survive to an independent controversy which does not advance the purpose of 11 USC 702 (1970) "To cause the estates of bankrupts to be collected...and distributed."

STATEMENT OF THE CASE

The Honorable Cecelia Goetz, Bankruptcy Judge, U.S. District Court, Eastern District of New York entered an order forfeiting a leasehold and other assets of the bankrupt, Pioneer Warehouse Corp., to the landlord of the building at 41 Flatbush Avenue, Brooklyn, New York, which had been occupied by that lessee since 1960. The order was signed on November 21, 1979 and a memorandum decision was filed on December 6, 1979. See appendix pages 9a. This decision was affirmed by the United States District Court for the Eastern District of New York, Nickerson J. on February 1, 1980, and reaffirmed by the Second Circuit Court of Appeals on May 12, 1980. See appendix pages 4a. A petition for re-hearing was denied by order of July 29, 1980. (App. 2a-3a).

Pioneer, a depository for the archives of law firms and financial institutions in the Wall Street and downtown Brooklyn area of New York City, had filed a petition under Chapter XI of the Bankruptcy Act 1938 11 USC 701 et seq on March 23, 1978.

The primary assets of the debtor was its valuable lease and its trade fixtures steel and wooden shelving of modular design which it had purchased and erected over a period of 18 years in the archive storage spaces the corporation had sub-leased to its Wall Street tenants under written lease agreements. All of the shelving on the sub-leased premises of the archive storage tenants is in their possession. None of these tenants are bankrupt or under the control of the bankruptcy court.

The corporation had taken the shelter of Chapter XI to prevent execution of a judgement obtained by the landlord for default in a lease settlement agreement signed on July 9, 1976.

Eviction of the tenant Pioneer under the master lease and possession by the landlord meant that the landlord would

fall heir to the valuable sub-leases and the removal and retrieval services ancillary to a business that had been profitable for many years.

When the settlement agreement modifying the original lease was signed Safir, the petitioner herein, was President and sole stockholder of the Pioneer business. He personally guaranteed Pioneer's obligations under the agreement. See Safir affidavit app. p. 6a.

At that time, Safir assigned to himself as security for this personal guarantee of the corporate obligation all right, title and interest in and to the steel and wooden shelving (trade fixtures) that Pioneer owned.

When Pioneer filed its petition on March 23, 1978, it did not list the shelving as an asset.

After approximately 15 months as debtor in possession, Pioneer was adjudicated a bankrupt on June 21, 1979.

On October 24, 1979, the Trustee, Marvin A, Chudnoff (who had been nominated by the landlord and who shard office space with the landlord's counsel) made an application to the Bankruptcy Court for authority to sell the lease, the goodwill, and the office equipment. He included the shelving in his request. The Landlord through counsel cross-moved for possession of the building under an ipso facto bankruptcy clause (invalidated by the Bankruptcy Reform Act 1978 Sec. 541 (c)(1)(B)) including all the trade fixtures claiming entitlement under the lease.

Petitioner, although in attendance, had received no notice of the cross-motions to be "argued" at the hearing before Judge Goetz on November 14, 1979 but was able to file an answer to the cross application of the landlord with Judge Goetz two days later on November 16, 1979, informing the Court of the assignment of the shelving asserting rights as an adverse claimant and not consenting to jurisdiction by the bankruptcy court. Without any further hearing on the facts, the Court peremptorily

ordered the forfeiture of the lease and included the shelving in the forfeiture. See Safir answer Nov. 16, 1979 app. pp. 19a-20a.

On December 6, in the Court's decision, Petitioner's challenge to the Court's jurisdiction was acknowledged but rejected in spite of the absence of a preliminary inquiry and the uncontroverted substantiality of the claims.

The decision was upheld on the merits by both the District Court and the 2nd Circuit summarily. The Court of Appeals permitted this petitioner to represent the bankrupt estate as well as his own adverse interest as it appeared. The Trustee was adversary to the appeal and in accepting the Dec. 6 order - in effect thereafter abandoned the leasehold estate. See In re Hollidays Tax Services Inc. 417 F Supp. 182 U.S.D.C. EDN.Y. (1976).

ARGUMENT

This petition breaks no new legal ground. Its genesis is in Harrison v. Chamberlin 271 U.S. 191. The issue here was decided in Cline v. Kaplan, 323 U.S. 97 (1944) where Mr. Justice Frankfurter stated for the Court:

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the Court." Thompson v. Magnolia Co., 309 U.S. 478, 481.
>
> "If the property is not in the Courts possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy he has ;the right to have the merits of his claim adjudicated in suits of the ordinary character, with the rights and remedies incident thereto." Galbraith v. Vallely 256 U.S. 46,50.

The property in this case, the steel and wooden shelving was in warehouse space sub-leased to tenants of the bankruptcy under discrete lease indentures. The shelving assigned to this petitioner was in the possession of these sub-tenants and not the bankrupt where the Court's jurisdiction could be invoked.

These sub-tenants were not bankrupt and the Court had no jurisdiction as to them. Indeed, Pioneer, under its agreement with these tenants, agreed that access to the rented space would be allowed only to specific individuals designated by the sub-lessee. Neither the trustee in bankruptcy nor the landlord had any right of access to, much less possession of, the assigned shelving.

In this posture, only the empty shelving existing in unrented space elsewhere in the building could conceivably be considered in the possession of the bankrupt at the time that the petition was filed. The recent decision in the 9th Circuit, Pic Realty v. Evans, 605 F.2d 476 (1979) excluded all furnishings of a hotel from jurisdiction of the Court

while granting jurisdiction over the lease itself when an adverse claim was presented.

The challenge to the Bankruptcy Court's jurisdiction in this case is supported by the 7th Circuit's decision In re: Process-Manz Press, Inc., 369 F2d 513 (1966) rehearing denied en banc October 3, 1966, and certiorari denied March 13, 1967. See 87 S Ct 1022. The 7th Circuit's decision is in direct conflict with the 2nd Circuit's decision in this case. Petitioner's clam that the Bankruptcy Court was without jurisdiction to summarily adjudicate a controversy over the trade fixtures held adversely to the bankrupt's estate without the consent of the adverse claimant Safir in this case is analgous thereto.

It is clear through the petitioner's "Answer to Cross-Application of Landlord" filed with the Court on November 16, 1979, that timely knowledge of petitioner's adverse claim was before the Court. The Court was apprised not only of the assignment of the chattels to the petitioner but of the petitioner's liability for default of the settlement agreement by the warehouse corporation. There was no statement in the decision of the bankruptcy Judge that Safir's claim was merely colorable, nor was there any action taken to preliminarily determine whether the claim was real and substantial. The adverse claim is substantial if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of the claim. See Matter of Fuller & Magee, CCA 2nd Cir. 294 Fed. 71: also Thompson v. Dachner (See A.2d 1954, 214 F.2d 922). It has been held that a claim is not to be deemed merely colorable so as to give the Bankruptcy Court summary jurisdiction if its validity depends upon disputed facts as to which there is conflict of evidence as well as a controversy in matter of law. See Matter of Midtown Contracting Co., Circuit Court of Appeals, 2nd Circuit, 243 Fed. 56 cert. denied, 245 U.S. 654. And in another case, the 2nd Circuit has held:

"It is now well settled that if there is a real and substantial controversy of law or fact as to property held adversely to a bankrupt...

a contested matter of right, involving some fair doubt and reasonable room for controversy...

the Bankruptcy Court is without jurisdiction to adjudicate the matter, but the trustee must have resorted to a plenary suit."

Matter of Meiselman, CCA 2nd Cir., F.2d 995.

The Bankruptcy Judge in this case made no inquiry to determine that a substantial claim existed as to property adversely held nor to the existence of the sub-leases.

In this case the inordinate basis to effect the forfeiture five (5) days after the Court was apprised of the adverse claim without any controverting evidence solicited or further proof requested of the claimant is indicative that due process was trampled. The chief executive officer of the assignor company was the assignee and there was a specific undertaking by the chief executive officer to warrant such assignment. Any challenge to his title was an independent controversy. A decision in the Second Circuit In re Oceana International, Inc. 376 F. Supp. 956, 961 (1974) Weinfeld, J. held:

(3) Even when property in dispute is in the court's possession, or the adverse party consents to jurisdiction, neither section 2a(7) nor section 23(b) grants jurisdiction over "independent litigations" that are unrelated to the purpose of the particular Bankruptcy Act proceeding.[25] Thus section 2a(7) confers summary and plenary jurisdiction[26] upon the bankruptcy court for the express purpose of causing "the estates of bankrupts," including Chapter XI debtors,[27] "to be collected...and distributed." Notes omitted.

Petitioner submits that the Second Circuit is not only in conflict with the 7th Circuit in this matter, but it is in conflict with all of its previous decisions on the same subject.

As in Re: Process-Manz Press, Inc., supra., it is also clear here that no time from the beginning to the end of the proceeding before the referee did Safir submit to the summary jurisdiction of the Court in the disposition of its claim. In this case, the referee refused to hear all of the evidence and did not rule on Safir's objection to summary jurisdiction until it made its decision as well upon the merits. See In Re: Process-Manz Press, supra at p. 517.

Pioneer, in its petition under Chapter XI, did not claim ownership of the shelving in listing its assets. During the Chapter XI period it was Safir who, in espousing the feasability of rehabilitation of the debtor corporation (he owned 100% of the stock) reintroduced its availability for a reorganized company. That the Bankruptcy Court in its decision should turn this proffer by Safir against him (see appendix page 17a) to achieve its jurisdiction arbitrarily was unjustifiable.

In the assumption of its jurisdiction of this controversy, the Bankruptcy Court determined that the bankrupt had no right, title, or interest in this property. Once that decision was made the court's jurisdiction was at an end. Notwithstanding this pronouncement, the Court sought to determine the rights of the third party Safir thereto.

This is contrary to the position taken in the 9th Circuit in the case of Kaplan vs. Guttman, 217 F.2d 481, 484, 485, wherein the Court held under those circumstances:

> "The Bankruptcy Court has no jurisdiction in controversied between third parties not involving the debtor or his property" citing its own decision in Evarts v. Eloy Gin Corp., 9th Circuit, 204 F.2d 712, 717.

It was further held in "Kaplan" supra that the fact that in that case the conciliation commissioner rather than the bankruptcy judge claimed to have found the fund in his possession or in this case the shelving in the possession of the Bankruptcy Court does not give him jurisdiction. He is a stakeholder. See In Re: Prince, 2nd Cir. 89 F.2d 681, 684.

Further, the Court in Kaplan vs. Guttman supra cites In Re: Berkowitz D.C. 143 F 598, 602.

> "The goods in question had previously been decided by the referee to belong not to the bankrupt estate but to the bankrupt's wife, and, if this finding was correct he had no further power over them. A court of bankruptcy cannot administer the property of a third person, neither can it protect such property from the claims of others...no jurisdiction over such a subject has been committed to the bankrupt court."

In the case of this Petitioner, however, the Court gratuitiously determined the rights of the parties over which it had no jurisdiction in a protective bias to the landlord. Here a plenary suit was needed where the expedience of the summary proceeding endangered the substantive rights of the claimant especially in a matter where non-bankruptcy law questions best decided in a state court required resolution.

State Court resolution was required because the Bankruptcy Judge was in error on New York State law in regard to trade fixtures.

The Bankruptcy Court in its opinion stated:

> "None of the shelving constituted property of the lessee which could have been removed, all of it falls into the category of fixtures. Like the shelves and drawers and countertables in Tabor vs. Robinson, 36 BARB (Superior Ct.) 483, 485 (1862)

> "They were made to fit the building and not any other building. And when he removed them, the shelves, certainly and the drawers and countertables were probably little better than so much lumber. They were for those reasons fixtures or a part of the freehold."

New York State Law completely rejects the theory as no longer valid. Controlling on the subject of chattels and trade fixtures is the decision in Godfrey vs. The State of New York, 201 NYS 2d 649, 678, Ct. of Claims (1960) wherein the Court held:

> "where articles are claimed to be fixtures such claims may not be allowed when the court finds that they are not so attached that their removal will either injure the building or so damage the items themselves as to render them useless. Therefore, claims for items including but not limited to wood storage bins, piked tire racks, work benches, water coolers, will not be allowed. The mere fact that the articles herein involved are attached to the floor or post or wall merely for the purpose of stability does not render them fixtures. Murdock vs. Gifford, 18 NY 28; McRea vs. Central National Bank of Troy, 66 NY 489; Matter of the City of New York, (North River Waterfront) 111 App. Div. 865, 103 NYS 2nd 908, affirmed 189 NY 508, 81 NE 1162. To change the character of a chattel to one of a fixture requires more than nailing or bolting it to the floor or wall or a ceiling. This is normally a precaution against damage of the chattel itself and for the safety of individuals and not an intention to surrender ownership thereof." Accord Antonowsky v. State, 180 NYS 2d 966 (1958).

All the shelving in the Pioneer Warehouse which was assigned to this Petitioner were of specific modular design

and attached to walls merely for the purpose of stability.

Further, the Court in citing Article XXI of the lease "ownership of improvements and trade fixtures and Surrender of Premises" Section 1. completely ignored Sec. 3 of the same article. Section 3 states:

"The lessees shall not have any obligation on the expiration or earlier termination of this lease...to turn over or deliver to the lessors any personal property or furnishings which throughout the term of the lease was the property of the Lessees..."

The landlord was falling heir to a going business packaged by the Court for the real estate owners with the chattels of the bankrupt on a misreading of New York State Law as it replies to fixtures in any landlord and tenant relationship in New York law. The landlord has indeed already leased the property to a new entity, the 41 Flatbush Avenue, Corp., a family-related enterprise and the archival services are being conducted as if the debtor never existed and without start-up costs for the trade fixtures as a debtor's chattels were "providently" available.

REASON FOR GRANTING THE WRIT

The savings provision of the Bankruptcy Reform Act 1978 (PL 95-598 Title IV Sec. 403(a) 11 USC prec. 101 note.) continue that old law during the transition period for proceedings commenced before October 1, 1979. In this case, the proceeding under debtor in possession Chapter XI of the old law was terminated and the proceeding under a trustee in Chapter VII hastily commenced prior to the new law taking effect for the obvious purpose of protecting the landlord under the ipso facto bankruptcy clause in the lease which was to be invalid in any proceedings begun after October 1, 1979. See PL 95-598; 92 STAT. 2573; 11 USC 363 L and 11 USC 541 (c) (1) (B).

The forfeiture order of November 21, 1979 was effective nunc pro tunc 21 months after the filing of the petition and 2 months after the new law was in effect. Contrast Matter of Eaton Factors, 3 BR 20, 23 (1980) citing U.S. ex. rel. Hintopoulos v. Shaughnessy, 353 US 72, 78 (1957) on taking cognizance of the contemporary will of Congress.

When the lease was forfeited, the rationale of the Court's earlier decision (see decision of June 21, 1979 adjudicating debtor Pioneer cited as 2 B.R. 1) "want of prosecution" and "failure to offer a plan" was discarded. The statutory facade of "want of prosecution" was no longer valid since the bankruptcy judge was now deciding that Pioneer never legally had a chance to survive from the date it filed its petition. Once "want of prosecution" had accomplished its objective of adjudication, it was irrelevant when the need arose for a new rationale of forfeiture of the primary asset of the estate of the corporation, a trustee in place would justify resort to the ipso facto clause where the precedents of Queens Blvd. v. Blum, 503 F. 2d 202 (2nd Circuit 1974) Timbers, J. had restrained its use against a debtor in possession. See partial transcript of oral argument April 7, 1980 app. pages 21a to 26a. For earlier defense to "Want of Prosecution" see excerpt of brief of appellant debtor to adjudication in Ct. of Appeals docket 79-5052 app. pages 32 et seq.

This challenge to the jurisdiction of the Court represents the only avenue left to this Petitioner to salvage that which represented his stake in Pioneer. He believes himself the victim of a confiscatory abuse of power such as to invoke this Court's power of supervision. The terse summary nature of the affirmations below were at such odds with Cline v. Kaplan, supra. as to require a "suspension of disbelief" by these Courts "a luxury the Constitution does not afford." Halkin v. Helms 26 FRS 2d 1019.

The Second Circuit order in response to the petition for rehearing with suggestion for rehearing in banc, just as in the appeal in 79-5052, clearly elected not to address the serious charges of bias therein contained. See Petition appendix pages 27a-31a Contrast order app. 2a.

The reasons appear unfathomable unless they relate to a dissatisfaction in the 2nd Circuit with this petitioners continuing maritime quest as the decision adjudicating Pioneer (In Re: Pioneer 2 B.R. 1, 4) would indicate. See also Safir v. Kreps et al 551 F 2d 447 (DC Cir. 1977) cert. denied 434 US 820 (1978) and Safir v. Blackwell 579 F 2d 742 (2nd Cir. 1979) cert. denied 441 US 943 (1980).

CONCLUSION

Petitioner prays these speculations are groundless and that the Writ will be granted on its merit alone.

Respectfully submitted,

MARSHALL P. SAFIR, Pro se
271 Grand Central Parkway
Floral Park, N.Y. 11005
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November 25, 1980

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July, one thousand nine hundred and eighty.

In Re: Pioneer Warehouse Corp., JUL. 29, 1980

Debtor

MARSHALL P. SAFIR and PIONEER WAREHOUSE,

Appellants,

-against-

MARVIN CHUDNOFF, as Trustee, and SELIGMAN & HEIDEN,

Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Marshall P. Safir, appellant pro se, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

WILFRED FEINBERG
Chief Judge
80-5010

UNITED STATES COURT OF APPEALS
Second Circuit

JUL. 29, 1980

In Re:

PIONEER WAREHOUSE CORPORATION 80-5010
Debtor.

By order dated May 12, 1980, we affirmed the judgement of the district court in this case. Marshall P. Safir, appellant pro se, now has filed a petition for rehearing. Petitioner suggests that when we affirmed the judgement of the district court in our prior order, we did not consider the briefs submitted on his appeal, but instead decided the case solely on the basis of the record below. Petitioner, who is not a lawyer, stresses that the language of our prior order states the the cause "came to be heard on the transcript of record from the United States District Court for Eastern District of New York." This language simply indicates that the case came to us from the United States District Court for the Eastern District of New York along with the record of the relevant proceedigs in that court. Contrary to petitioner's suggestion, the panel that heard his appeal read and carefully considered all papers submitted to it, including the brief and appendix filed by appellant on April 18, 1980.

Petitioner also misconstrues the import of the legend attached to our prior order, which states that, "Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court." As we made clear in United States v. Joly, 493 F.2d 672, (2d Cir. 1974), these summary orders are "not uniformly available to all parties" in the sense that some attorneys -- such as those from the government and Legal Aid -- would be more likely to know of these decisions than others; in addition, as we also pointed out in Joly,

"even if counsel for both sides are aware of a particular summary affirmance, they will not necessarily have equal access to the briefs and the trial record, which alone would reveal what issues were raised in the absence of a plenary opinion." Id. at 676 (footnote omitted). By "equal access" we obviously meant equal convenience of access; despite petitioner's intimation to the contrary, orders of this court are not secret or confidential unless sealed by order of the court, and that is done rarely and only under exceptional circumstances. There was no such order here. For the reasons stated in Local Rule § 0.23 of this court, summary orders may not be cited as precedent in other cases and are therefore not published in slip sheet form. That is the import of the legend referred to by petitioner; summary orders, like filed opinions, are public records and are freely available for inspection in the Clerk's office.

Since we find no merit in any of petitioner's arguments, the petition for rehearing is denied.

WILFRED FEINBERG
Chief Judge
HENRY J. FRIENDLY
WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES COURT OF APPEALS

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

MAY 12, 1980

Present:

HONORABLE HENRY J. FRIENDLY
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS
Circuit Judges

In Re:

PIONEER WAREHOUSE CORPORATION,
Debtor. 80-5010

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel for Marvin H. Chudnoff, Trustee and Seligmann & Heiden and by appellant Marshall P. Safir pro se.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District Court be and it hereby is AFFIRMED for the reasons given in the opinion of Bankruptcy Judge Goetz, dated December 6, 1979, affirmed by the order of Judge Nickerson, dated February 1, 1980.

HENRY J. FRIENDLY
WILFRED FEINBERG
WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE PIONEER WAREHOUSE CORP., 79 C 3037

Bankrupt.

MARSHALL P. SAFIR, Pro Se

BRUCE H. ROSWICK, ESQ.
New York, New York
for the trustee in bankruptcy

TENZER, GREENBLATT, FALLON & KAPLAN
(Stacy Z. Wallach, Esq., of counsel)
for bankrupt's former landlord

NICKERSON, District Judge

The order of Bankruptcy Judge Cecilia H. Goetz of November 21, 1979 and her memorandum of December 6, 1979 are affirmed. So ordered.

Dated: Brooklyn, New York
February 1, 1980

Eugene H. Nickerson, U.S.D.J.

The Clerk shall make copies of this Order and serve it upon the parties.

ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re PIONEER WAREHOUSE CORP., Index No. 78 B 602

Bankrupt AFFIDAVIT

MARSHALL P. SAFIR, being duly sworn, deposes and says:

1. On November 21, 1979 Bankruptcy Judge the Honorable Cecelia H. Goetz signed an order which of not reversed or stayed will result in the forfeiture to one creditor (the landord) of the name and goodwill, the valuable lease of its premises, the trade fixtures and the profitable going business itself on November 30, 1979.

2. I am the guarantor of a lease between the bankrupt Pioneer and its landlord at 41 Flatbush Ave., Brooklyn, N.Y. under a modified settlement agreement signed on July 9, 1976.

3. This fact and an assignment to me of the right, title and interest in and to all steel and wood shelving in the warehouse building (41 Flatbush Avenue) was made known to the Bankruptcy Court prior to the issuance of the Court's order of November 21, 1979, attachment A hereto.

4. These facts and my refusal to consent to the jurisdiction of the Bankruptcy Court as an adverse claimant to the estate of the bankrupt were set forth by answering affidavit on November 16, 1979 see attachment B hereto.

5. I am also the sole stockholder of Pioneer Warehouse Corp. the debtor in Chapter XI who was adjudicated on June 21, 1979 by Judge Goetz and which adjudication is now on appeal to the 2nd Circuit. The timing of the order is intended to make the appeal moot. The appeal has been fully brief and oral argument is scheduled for December 12, 1979. A copy of my reply brief in that appeal is attachment C hereto as it addresses the rejection of the lease by the

trustee (and the Court below) in the face of subsections 541(c) and 365(e) of the New Bankruptcy Reform Act and the teachings of In Re Garfinkle, 577 F. 2d 901 (5th Cir. 1978) in that the valuable lease is the property of the estate and under the law cannot be forfeited to the landlord by fiat.

6. Public auction, where I as guarantor can bid to protect against a total repayment obligation under the judgement cited in attachment B will inure to the benefit of all creditors. This willingness to "put something in the pot" (see Garfinkle, supra, p. 906) if the lease was assumed by the trustee was conveyed to the Court at the hearing on November 14, 1979.

7. This position by the guarantor of the lease and sole stockholder of the bankrupt was also conveyed by letter to the trustee on September 24, 1979 cautioning him on the potential for conflict of interest in his relationship with the landlord. The trustee makes his offices with Tenzer, Greenblatt, Fallon & Kaplan the landlord's counsel and was chosen by them see attachment D hereto, page 3.

8. The split personalty of the trustee in In Re Garfinkle, supra, is analagous to the position of the trustee in this case. Under the new Bankruptcy statute he had the power to assume for the benefit of the estate but this would injure his relationship with the landlord and this schizophrenic dilemma was solvable only by seeking the prescription of a court order.

9. In Garfinkle the Court rejected the trustee and the landlord under similar circumstances (even before the new law) and placed the leasehold outside the bankruptcy administration without destroying the underlying estate and an obligation (mortgage in that case) of the original lessee.

10. In this case the court under the exact circumstances - the obligation here being one to the guarantor by the lessee - the Court grants the landlord and his selected trustee the relief they both needed to the detriment of the guarantor of the lease and the creditors in general.

11. Affiant submits that the Court below was clearly erroneous in assuming summary jurisdiction under the circumstances and demands summary reversal for lack of plenary jurisdiction.

12. Affiant further prays that pending the outcome of the Court's determination of this motion that the order of the Bankruptcy Court be stayed.

Sworn to before me this
27th day of November, 1979 MARSHALL P. SAFIR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re:

PIONEER WAREHOUSE CORPORATION

Bankrupt.

Bankruptcy No.
78 B 602

MEMORANDUM

Marvin H. Chudnoff, the Trustee in Bankruptcy of Pioneer Warehouse Corporation ("Pioneer"), the bankrupt herein, has applied to the court for authority to sell his right, title and interest -- if any -- in certain assets. Principal among these is a lease on 41 Flatbush Avenue, Brooklyn, New York, the premises at which the bankrupt has been doing business. The Trustee seeks certain ancillary relief with respect to this lease including the authority to assume it; a decree that the lease is in full force and effect; and a declaration that there are no defaults under it or authority to cure such defaults.

The Trustee also seeks to sell whatever right, title and interest he may have in each of the following:

a) the right in and to the name "Pioneer" Warehouse Corporation" or "Pioneer Warehouse";

b) any good will of said bankrupt corporation;

c) the Trustee's interest, if any, in and to the shelving on the premises; and

d) the Trustee's interest in and to all equipment and furniture located at the bankrupt's premises.

The owners and the landlord of the premises, through their attorney, appose the proposed sale. The owners and landlord are (a) Rita Heiden, individually, (b) Arthur Seligmann and Douglas Greene, as trustees under a certain

trust created by Maurice Firuski, and (c) Arthur Seligmann and Jean Seligmann, as Executors under the Last Will and Testament of Hortense Seligmann, Deceased -- herinafter collectively referred to as "Seligmann & Heiden." Seligmann & Heiden oppose the Trustee's application on the ground that the assets which the Trustee seeks to sell "are not assets of Pioneer, that Pioneer has no interest in same that can be either sold, assigned or transferred, and that the Trustee should be directed to surrender the premises to Seligmann and Heiden forthwith."

Marshall P. Safir, the sole stockholder of Pioneer, has appeared pro se. Inter alia, he challenges the Court's jurisdiction over the shelving on Pioneer's premises.

The Proceedings Heretofore Had Herein

The history of this litigation can be traced in three earlier opinions of this Court dated March 22, 1974, January 26, 1979, and June 21, 1979. These opinions should be read in supplementation of the recitals herein.

Pioneer filed under Chapter XI on March 23, 1978. That filing aborted a proceeding in the New York courts just as a judgement of eviction was about to be entered against Pioneer based on settlement agreements executed by Pioneer and Safir with Seligmann & heiden. On April 3, 1978, pursuant to an ipso facto bankruptcy clause in Pioneer's lease, Seligmann & Heiden terminated the lease. The term fixed in the lease expires in 1985. The operation of the leased building is Pioneer's sole business and the lease itself was Pioneer's principal asset. At the time the Chapter XI proceeding was filed, Pioneer was in arrears to Seligmann & Heiden, according to their undisputed claim, for over $180,000.

On June 21, 1979, this Court ordered the Chapter XI proceedings converted to straight bankruptcy. It did so primarily because of the prejudice being done Seligmann & Heiden by Pioneer's continued occupation nof their property. On August 10, 1979, the order of adjudication was affirmed by District Court Judge Nickerson. An appeal is now pending before the Second Circuit.

On August 30, 1979, this Court directed Pioneer's trustee in bankruptcy to liquidate is property and assets. A stay of that order pending disposition of Pioneer's appeal to the Second Circuit was denied by the Bankruptcy Court, by the United States District Court and, on October 4, 1979, by the Court of Appeals, acting through Judge Leonard P. Moore, James L. Oakes and Jon O. Newman.

Since Pioneer's lease has been validly terminated, the Trustee would appear to have no alternative but to quit the leased premises. Instead, however, he has brought on the present application, the disposition of which will, no doubt, provide the excuse for still another appeal and stay application.

The Lease

This Court is satisfied that the bankrupt has no leasehold interest in the Flatbush Building. That interest was validly terminated by Seligmann & Heiden promptly upon the filing of the Chapter XI petition.

As the Second Circuit explicitly stated in Queens Boulevard Wine and Liquor Corp v. Blum, 503 F.2d 202, 207 (2nd Cir., 1974):

> "Bankruptcy forfeiture provisions are necessary for the protection of landlords and generally are enforceable."

Accord: In re D. H. Overmeyer, Co., Inc., 510 F.2d 329 (2nd Cir., 1975). In sharp contrast to the facts in Queens Boulevard, all equitable considerations support the enforcement of the clause in this case. See the Opinion of this Court dated June 21, 1979, adjudicating Pioneer as a bankrupt.

Since ;the lease was validly terminated, there exists nothing for the Trustee either to accept or reject. Accordingly, In re Garfinkel, 577 F.2d 901 (5th Cir., 1978), cited by Mr. Safir, is not in point. There is no leasehold interest to which the bankrupt can succeed.

Because the lease was terminated under its bankruptcy clause, it is unnecessary to decide whether it likewise should be deemed at an end because of the proceedings in the New York courts, including the settlement agreements entered into by Pioneer and Safir in those proceedings. At the very least, however, the agreements to permit entry of a judgement of eviction, if the defaults under the lease continued, reinforce the conclusion that all the equities in this matter lie with Seligmann & Heiden.

The Court will not accept the Trustee's invitation that it avoid adjudicating the question of the continued existence of a leasehold interest by permitting the Trustee to sell his right, title and interest, if any, in such lease to whoever was willing to buy thus both postponing resolution of the question of what right, title and interest, if any, the Trustee possesses and shifting such resolution to another tribunal. Section 2a(7) of the Bankruptcy Act vests the jurisdiction in this Court to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto..." 11 U.S.C. §11. In the

opinion of this Court it would be derelict in its duties to permit the course of action proposed by the Trustee.

The Court finds that the Trustee has no right, title or interest whatsoever in the Flatbush Building. Possession of those premises should promptly be turned over to Seligmann & Heiden.

The "Pioneer" Name

The termination of the lease terminated the right of "Pioneer" to use that designation as a tradename or trademark. The rights in that word under the terms of the lease now belong to Seligmann & Heiden.

Under the terms of the carefully drafted lease, the lessee is licensed to use the name "Pioneer" as its trade style or corporate name only, as long as it is not in default thereunder. However, the lease also provides that such use does not carry with it any property or ownership right therein and that upon the expiration or earlier termination of the lease the lessee shall cease and discontinue the use of the name "Pioneer."

Accordingly, the Trustee has no right, title or interest in the name "Pioneer" or in the good will, if any, of that name. Therefore, he has nothing to sell with respect to that name.

The Shelving

Insofar as the Trustee seeks authority to sell the wooden and metal shelving now on Pioneer's premises, that application is denied.

The shelving in question is essential to the operation of the business conducted in the Flatbush Building -- the storage of records. If such shelving were removed, it would have to be replaced, imposing a burden and expense of unknown dimensions.

With respect to the shelving, Pioneer's lease reads in part as follows:

"OWNERSHIP OF IMPROVEMENTS AND TRADE FIXTURES AND SURRENDER OF PREMISES.

"SECTION 1. Any and all alterations, additions and improvements made to,...the demised premises, by the Lessees, including any and all fixtures and articles of personal property attached to the building or buildings on the demised premises or used in connection with the operation and maintenance of the said buildings (except fixtures and furnishings which are not attached to said buildings and are movable without damage to themselves or the buildings, which shall always be and remain the property of the Lessees and may be removed by the Lessees prior to the expiration or earlier termination of this lease) shall, on the expiration or other earlier termination of this lease, become the property of and belong solely to the Lessors,...Any fixtures of furnishings belonging to the Lessees and which the Lessees have the right to remove as aforeprovided, if not removed by the Lessees prior to the expiration or earlier termination of this lease, shall be deemed to have been abandoned by the Lessees and shall be

and become the property of and belong solely to the lessors,..."

the bulk of the shelving used by Pioneer is made of wood, a small amount is of metal. These shelves are cut to fit the room in which they are found. Over the years the shelving has been assembled and dissassembled as needed. Some small quantity of the metal shelving is currently disassembled.

The end section of each set of shelves is attached to the wall of the room in which it is located. Removing the shelf would leave holes, but these could be easily patched. The wooden shelves, when disassembled, become simply lumber. The value of such used lumber would probably not compensate for the work required in disassembly and removal.

The situation with regard to the metal shelving is similar, although the disassembled value of this shelving may be somewhat greater.

At the Court has earlier found, the Pioneer lease was terminated in accordance with its terms on April 3, 1978. At that point, under the explicit provisions of the lease, all the shelving, whether or not under the lease it was the property of the lessee, became the property of the landlord. The Pioneer lease is a very carefully drafted document, obviously prepared by sophisticated lawyers for sophisticated laymen. The provision forfeiting the shelving whenever the lease was terminated, whatever the reasons for such termination, was necessarily drafted with full consciousness of the fact that the lease could be terminated, if resort was had to Chapter XI of the Bankruptcy Act. There is no reason for giving the language other than its

literal meaning or doing anything other than carry out the intention of the contracting parties.

That is not to say that there may not be circumstances in which a Bankruptcy Court, in the exercise of its equitable powers, might not refuse to give effect to a provision of the character found here. But in this case all the equities, as it has repeatedly been pointed out, lie with Seligmann & Heiden.

Moreover, in the opinion of the Court, none of the shelving constituted property of the lessee which could have been removed by Pioneer prior to the termination of its lease. All of it falls into the category of fixtures. Like the shelves, drawers and counter-tables in Tabor v. Robinson, 36 Barb. (Sup. Ct.) 483, 485 (1862): "they were made to fit the building...and not to fit any other building. And when he removed them, the shelves, certainly, and the drawers and counter-tables, were probably little better than so much lumber. They were for these reasons fixtures, and a part of the freehold..."

Even ;the metal shelving, which is currently disassembled, falls into the category of fixtures under the doctrine of constructive annexation. 23 New York Jr., Fixtures §5, p. 118 (1962).

In short, there is no right, title and interest in Pioneer available to the Trustee to sell.

But even if the facts were otherwise and the trustee had a right to remove and sell the shelves, such action would be improvident, no in the best interest of creditors and inequitable. Removing the shelving would generate no funds to the trustee since the value of the resulting lumber would probably not pay for the labor necessary. Such

removal would, however, create expense and hardship for the building's owners who own the largest undisputed claim against Pioneer. Removal of the shelves would interfere with the ability of Seligmann & Heiden to continue receiving income from the premises, income which has already been substantially reduced by Pioneer's conduct.

Theoretical benefits to them as creditors from the realization of the maximum amount from Pioneer's assets cannot justify imposition of great present injury on them. Indeed, there would be no benefit, either to them or to any other creditors, but only grave disadvantage.

Mr. Safir has filed a document entitled "Answer to Cross Application of Landlord" in which he claims that Pioneer assigned him "the right, title and interest in and to the steel and wooden shelving in the warehouse in the event that Pioneer would ever default." The alleged consideration is a guarantee he gave Seligmann & heiden of Pioneer's lease. Apparently, on the ground that he now owns the shelving, Mr. Safir contests the Court's jurisdiction over the cross-petition of Seligmann & Heiden and requests that it be dismissed for lack of summary jurisdiction.

Mr. Safir's challenge to the Court's jurisdiction is unsound, both factually and legally. Not only has Mr. Safir failed to produce the alleged assignment, but as recently as June 28, 1979, in the presence of Mr. Safir, counsel retained by him consistently described the shelving on the premises, as did Mr. Safir himself, as an asset of Pioneer. Nothing Mr. Safir has put before the Court would permit any finding of any right of ownership of any character in Mr. Safir, let alone one which would defeat the jurisdiction of this Court over this property.

The Personal Property and Equipment

The Trustee's application covers some unidentified furniture and equipment. An unaudited list of the assets of Pioneer as of June 21, 1979, shows equipment of the value of 1,072 depreciated to a value of zero.

According to Pioneer's lease, when it leased the Flatbush Building, it also leased a great deal of furniture and equipment, all of which is the property of Seligmann & Heiden. Apparently, Pioneer itself bought very little in the way of furniture and equipment. If, however, there exists any furniture or equipment not covered by the lease and which in fact belongs to Pioneer, there is no reason why the Trustee should not dispose of it in accordance with the normal fashion, that is: if it has no value, it should be abandoned;; if it has any value, it should be sold like any other assets of a bankrupt. That such furniture and equipment has been assigned no value on the books of Pioneer does not mean that it has no market value.

For the reasons stated above, this Court has entered an order directing the Trustee to relinquish the premises and the shelving on them to Seligmann & Heiden in accordance with the terms of Pioneer's lease. If the trustee is able to determine that there is any furniture or equipment on the premises belonging to Pioneer, such furniture and equipment is to be abandoned or sold as in any ordinary liquidation. Otherwise, the trustee's application has been denied in all respects.

Dated: Brooklyn, New York
December 6, 1979

CECELIA H. GOETZ
Bankruptcy Judge

Nov. 19, 1979
Cecelia H. Goetz
Bankruptcy Judge
Bankruptcy No.
78 B 602

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re:

PIONEER WAREHOUSE CORPORATION,

Bankrupt.

ANSWER TO CROSS-APPLICATION OF LANDLORD

TO: THE HON. CECELIA H. GOETZ,
BANKRUPTCY JUDGE

Prior to the hearing on November 14, 1979 both the Trustee and I were served by counsel for the landlord with a cross application which I did not read until after the hearing was over. This cross application requires an answer other than the peremptory consideration given to it by all the parties on that date.

I wish to apprise the court of two facts which, while lurking behind a great deal of the proceedings have never been properly brought forth.

1) I am the personal guarantor of the modified settlement agreement between the landlord and Pioneer and as such stand to lose a great deal personally if the sale of assets of Pioneer do not make the landlord whole. The landlord has been granted a judgement against me in the sum of $139,000.00.

2) As the only consideration for the guarantee of Pioneer's obligation, I granted myself an assignment of the right title and interest in and to

the steel and wooden shelving in the warehouse in the event that Pioneer would ever default. This agreement was between me as the sole stockholder of Pioneer both president and secretary and myself as an individual and personal guarantor.

"It has long been the law that a court of bankruptcy may not adjudicate a controversy with respect to property held adversely to the estate under a substantial claim of right without the consent of the adverse claimant."

Harrison v. Chamberlin 271 US191, 193.

I herewith state that I do not consent to the jurisdiction of the bankruptcy court in regard to the cross application of landlords counsel. The cross application coming without notice was a crudely continued attempt at establishing a waiver under the amendment (1952) of sec. 2 (a) (7) of the Bankruptcy Act for the Bankruptcy Court to assume summary jurisdiction. The trick should be branded for what it was.

In this case the time for answer under FRCP has not tolled. See Remington Treatise Fifth Edition Volume 5 sec. 2197, 2198, 2199 (p. 346-349).

It is stated in Collier sec. 2.04 (p. 149). "The issue of a jurisdictional defect may ordinarily be raised by proper direct attack in the Bankruptcy Court at any stage in the proceeding. See sec. 18.47 et seq. Davis v. Shackleford (CCA 8th Cir.) 91 F2D 148." Also Thompson v. Magnolia Petroleum 309 US 478.

I pray that the court will dismiss the landlords cross petition for lack of summary jurisdiction.

Respectfully,

MARSHALL P. SAFIR, Pro se
271 Grand Central Parkway
Floral Park, N.Y. 11005
212 225-0210

NOVEMBER 16, 1979

(The following transcript is not an official copy of the minutes of the proceedings of the court and is not to be reproduced or reported. It shall not be cited or quoted or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS 80-5010
FOR THE SECOND CIRCUIT OCT. 09, 1980

In re PIONEER WAREHOUSE CORPORATION

Debtor

MARSHALL P. SAFIR and PIONEER WAREHOUSE

Appellant

—v— Docket No. 80-5010

MARVIN CHUDNOFF, as Trustee and SELIGMAN & HEIDEN

Appellees

BEFORE:

HON. HENRY J. FRIENDLY, WILFRED FEINBERG and WILLIAM H. TIMBERS, Circuit Judges.

New York, May 7, 1980

Transcript of oral argument of appeal

Marshall P. Safir: Good morning, Your Honor. First I'm very grateful for the opportunity to be here, representing both myself and the estate of the bankrupt, thanks to the consideration of this panel. I would like to at the present time not go into too deeply the actual issues of the case itself, because I lthink that this panel already knows pretty well what my position is, the brief is, I believe, fairly clear as to my legal position. And I would just like at this particular time, unless the court has questions, to address issues raised in the answering brief of the trustee and the landlord. The trustee as appellee has grounded his satisfaction of the legal position, defending the bankruptcy court's decision, on a statement in appellant's opening brief that the forfeiture

was feasible, regardless of its equity, if the new code, bankruptcy code, would not apply. He read my statement out of context, however. First, he ignores the fact that Sec. 403(a) of the Bankruptcy Reform Act requires that the substantive rights of the debtor corporation as well as those of the general creditors and landlords be governed by the old bankruptcy act, and second, that there were two hurdles that had to be cleared for the forfeiture to be feasible: First the bankruptcy clause enforceability, and second an adversary hearing between the landlord and the debtor which had not taken place. A panel of this court clarified these rights of these parties in its decision of December 19, 1979, even though it affirmed the adjudication at that time, and further this panel in motion practice on April 8, 1980 rejected the last gasp attempts of the landlord's counsel to strip the debtor of an Article 3 forum by granting this appellant the extraordinary privilege of representing the debtor in this appeal. In regard to Sec. 403(a), Bankruptcy Reform Act, this appellant submits that a citation in the brief of both the landlord and the trustee, case In the Matter of Eaton Factors, Judge Babitt's opinion, Bankruptcy Judge Babitt's opinion, interpreted the court's descretion to shape the old law in harmony with the new code, citing U.S. ex rel Hintopoulos v. Shaughnessy, 353 U.S, 72 at page 78. The Supreme Court stated that it is not unreasonable for the court to take cognizance of present day conditions and attitudes. In this case, by summary action nunc pro tunc, the court unreasonably went the other way. These conditions and attitudes were shaped by the case law of Judge Timbers' own decision here in Queens Boulevard which is controlling in landlord and tenant relationships under the 1898 Bankruptcy Act in this circuit where forfeiture of the lease would destroy the debtor if termination was permitted without a full adversary hearing and decision on the merits.

Pardon sir?

Judge Timbers: There were Chapter 11 proceedings in that case.

Mr. Safir: Yes, in reorganization, but I'll get to that in a moment. Thank you, Judge Timbers. If the opinion of the Fifth Circuit is accepted here, In the Matter of Garfinkle, the performance of Pioneer under the lease places this appellant personally in an analogous position to the mortgagee interest in Garfinkle. In a case where a successor trustee had replaced the debtor under Chapter 7 rather than Chapter 11, Garfinkle was decided under the old law and addressed the situation where there was an attempt to terminate the lease by the exercise of the default clause. The issue in Queens Boulevard was whether enforcement of the clause in the particular case would be inconsistent with other provisions of the bankruptcy act. Just as enforcement could create inequity in reorganization, so could it in this case create inequity in straight bankruptcy. It would Topple the claim of Safir as guarantor under the lease to the preferred position of the landlord over him as guarantor and also the general creditors, and at the same time make no provision for putting something in the pot as in Garfinkle on the sale of the lease to a purchaser. Once a sale for the benefit of all creditors is feasible, in the words of Judge Babbit in Eaton, no explicit inconsistent provision exists between the old and the new laws. In this case when the equity considerations of Queens Boulevard and Garfinkle, under the old law, reject the ipso facto clause in its interpretations in the last few years. The issue of the ownership of the shelving, to move to the other aspect of this appeal, the issue of ownership as trade fixtures of the debtor corporation has been covered in my brief and the appellees apparently by their briefs have all but conceded the weakness of their position in this regard by offering no

meaningful support to the bankruptcy court's decision. Appellant prays that, on reversal of that decision, this court will hold that the shelving has been abandoned to himself personally as urged in the opening brief. New York State law as interpreted in Gottfried vs. The State, which was mentioned in the brief, makes clear that more than nailing or bolting to the floor or walls or ceiling is required to intend surrender of ownership to the landlord and this is even more evident by the clause in the lease itself. In Article 21 section 3, which is in the appendix, which states, "the leasee shall not have any obligation upon expiration or early termination of this lease to turn over or deliver to the leasors any personal property and furnishings which throughout the term of the lease was the property of the leasees including but not limited to any such personal property which may have surplanted any property on a list attached to the lease." For the reasons set forth in the brief and in this oral statement, appellant prays that the bankruptcy court order of December 6, 1979 be reversed in that it is clearly erroneous as to fact and law and is an abuse of its equitable powers under the old bankruptcy statutes. I'd like to reserve whatever time I have left for later on.

Stacy Wallach: May the court please, my name is Stacy Wallach of the firm of Tenzer, Greenblatt, Fallon & Kaplan. We are counsel to the appellee Seligman and Heiden, the largest general creditor of the bankrupt, its former landlord. Indeed when I say the largest general creditor, to be accurate its accepted claim is approximately $200,000. The claims of the other trade creditors which are not in dispute are about $25,000 or less. There is one other large objected to claim, there are some tax claims, but if you takl only about the unobjected to trade claims, my client's claim is at least eight times larger than all of the other trade creditors put together. The key here is that, in June of last year, the Chapter 11 debtor in possession was dismissed, his

proceeding was dismissed, on the ground that the chapter 11 debtor in possession had failed to prosecute its case diligently. The Pioneer Warehouse Corp. was adjudicated a bankrupt. That was appealed all the way up to this court. It was affirmed all the way up. Mr. Safir has some difficulty in separating himself out from the bankrupt corporation since he is the 100% stockholder but it is important to remember that the trustee in bankruptcy, who is here this morning to my right, represents the bankrupt corporation. He has not appealed from the subsequent order which is now before you, an order which simply gave the trustee directions as to how to liquidate, what he could sell as part of the bankrupt's estate and what he could not. The most important matter before the court is the former leasehold. It was a long term lease, but at the time that the decision was made here last November, it had barely five years left to run and the key is that the bankruptcy judge found that it had been properly terminated the year before by the landlord in accordance with the terms of the lease itself. There was no forfeiture in the bankruptcy court. There was a finding, as a matter of fact, in response to the trustee's application to the bankruptcy judge to find out if he had anything to sell, that in fact the landlord in March, April of 1978 had validly terminated the lease under the then existing law, the old bankruptcy act, and in accordance with the terms of the lease. So there was nothing for the trustee to sell. That finding of fact was based on facts which were not in dispute. Admitted into evidence were the various notices, they were admittedly received, there was no issue about that so she just followed the lease and the law in effect at the time and the bankruptcy judge of course concluded that the trustee had nothing to sell. The shelving was an even simpler matter. The lease expressly provided and it's found at the appellant's appendix at page 9, it's page 8 of Bankruptcy Judge Goetz' opinion. The former simply provided that fixtures such as shelving, any kind of fixtures, if they were

not removed by the time of the termination of the lease, belong to the landlord who has conceded that they had not been removed, they're in there now. In addition she made a separate finding of fact, unrelated, that as far as the trustee was concerned, there was no point to his even attempting to remove it because it was uneconomic. That was based on very substantial testimony in the record. Clearly it was a finding of fact on her part. It's not clearly erroneous, there was very substantial testimony. The final part of the order was that she directed the trustee to cease operating the business and to turn over the building back to the landlord, that naturally followed form her prior findings. So our position is, she applied the bankruptcy act because that was the law that she's told to apply, and of course the Queens Boulevard liquor case stands, among other things, for the proposition that the old 70(b) is enforceable generally, and that it is only special equitable circumstances in reorganization proceedings that might require some deviation. This, of course, is an order in a straight bankruptcy, not in a reorganization. So she applied the old law, she applied it to the lease, she applied it on very substantial facts and we believe that her order should be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

PIONEER WAREHOUSE CORPORATION,

Debtor.

Second Circuit Docket Number 80-5010

E.D.N.Y. Index Number 79 Civ. 3037

MARSHALL P. SAFIR and PIONEER WAREHOUSE,

Appellants

Bankruptcy Court Index Number 78 B 602

-against-

MARVIN CHUDNOFF, As Trustee, and SELIGMANN & HEIDEN,

Appellees.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

Submitted By,
MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, New York 11005
(212) 225-0210

PETITION

On May 12, 1980, a panel of this Court (Friendly, Feinberg, Timbers J.J.) affirmed an order of the U.S. District Court EDNY (Nickerson, J) which had affirmed an order and opinion of the Bankruptcy Court of (Goetz, B.J.)

The Court's affirmation as stated was based not on the proceedings in its own jurisdiction after the notice of appeal had been filed but rather on the transcript of the record in the bankruptcy court (The District Court having set a pattern by summarily affirming without any brief by the appellant or respondents)

After Notice of Appeal was filed in this court, the respondent's counsel, the firm of Tenzer, Greenblatt, Fallon & Kaplan, moved to dismiss the appeal (See Attachment A hereto)

Appellant opposed the motion (See Attachment B hereto) citing the abuse of process by false affidavit of Stacy L. Wallach, Esq. of that law firm. The motion was argued before the same panel of this court, Judges Friendly, Feinberg & Timbers on April 8, 1980 and the motion was demied (See Attachment C hereto) The requirement to file briefs was set forth in the order. The case was then briefed by appellant and respondent landlord and trustee in bankruptcy. (See docket sheet attachement D hereto) The Court allowed 15 minutes per side for oral argument held on May 7, 1980. (See Attachment E hereto)

Discussion

Appellant, acting pro se and by the denial of the motion of the landlord, admitted to this bar for the purpose of acting for a bankrupt corporation of which he was the sole stockholder, See in re Holliday Tax Services Inc. 417 F Supp. 182 USDC EDNY (1976) Weinstein, J., hereby petitions for rehearing on the grounds that the panel did not consider the brief and appendix filed by the appellant petitioner on April 18, 1980 in making its decision.

The motion to dismiss of the appellee's counsel, Tenzer, Greenblatt, Fallon and Kaplan, evidenced a serious breach of ethical conduct and an abuse of their duty as advocate to the legal system by the use of false statements in support of the motion to dismiss. (See Attachment A pages 6 & 7, par. 25, 26, 27,) and appellant petitioner's reply (See Attachment B pages 1 through 4 and exhibits pages 10 through 61). By so doing, the affiant member of the bar was in violation of Ethical Consideration 7-26 of the American Bar Association Code of Professional Responsibility and subject to Disciplinary Rule 7-102(A) (4) of the Code. See Geders v. US 96 S. Ct. 1330, 1336 (1976). The offending law firm would also be subject to Sec. 487 of the Judiciary Law of N.Y., State which affords a party injured by (in this case a fraudulently overstated money judgement against the appellant-petitioner) a treble damage remedy which may subject this politically active firm to a multi-million dollar liability. The task of proving such liability would certainly be facilitated if the U.S. Court of Appeals for the Second Circuit took cognizance that its process or that of N.Y. State Supreme Court's was abused by such conduct. As stated in Professional Responsibility — A guide for attorneys, copyright 1978 A.B.A. p. 167.

> "When an attorney is aware of a fraud perpetuated on a tribunal by a person other than his client, he has a duty to report the fraud to the tribunal DR7-102 (B) (2) See Precision Instrument Manufacturing Co. v. Automotive Maintenance Mach. Co (1945) 324 US806."

Surely, a layman admitted to practice by special circumstance has a similar duty. The court's duty with this knowledge is also in the canons.

The Court did not, for reasons unstated, address this abuse on the record when it was brought to its attention.

Instead it seemingly ignored reference to this affront to Canons # 15, 22, 29, 32 of the A.B.A. claiming to hear the case on the "transcript of the record from the US District Court." as if briefs were not submitted. Both the brief and motion papers contained reference to the false affidavits.

The instructions accompanying the summary affiarmance of May 12 state

> "N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court." (See Att. I)

One must be prepared to address the possibility that this panel considered the protection of a well known law firm from jeopardy of penal prosecution and civil damages as more important than openly deciding a case on the merits of the appeal based on the indexed documents on appeal, the brief and appendix of the appellant and the full disclosure of the appellate record for review on application for Writ of Certiorari in the Supreme Court (or in this case potentially a Writ under 28 USC 1651(a)) in the ancillary manifestation of prima facie misconduct by members of the bar against a non-lawyer acting pro se.

Concise Statement of the Issue and Its Importance

The case on the merits warrants more consideration than it received. Summary affirmance of the lower courts erroneous reading the Fifth Circit, see In re Garfinkle 577 F 2d 901 (1978) also a novel question on the potential for abuse of Sec. 403(a) of the Bankruptcy Reform Act in circumventing the clear legislative intent of the Congress regarding ipso facto bankruptcy clauses under the new law is involved. Clearly the issues here were legitmate. Petitioner in his dismay would also throw caution to the winds by indicating his personal reputation as a pro se litigant has been too favorably addressed by this Court and

the District of Columbia Circuit See Safir vs. Blackwell, et al. 579 F 2d 742 (2nd Cir. 1978) cert denied, 441 US 943 (1979) & Safir v. Kreps 551 F2d 447 (DC Cir. 1977) cert denied 434 US 820 (1977) to be so peremptorily dismissed on grounds which must raise the issue of bias in favor of this law firm and its false affiant partner who apparently clerked in this Court a few years ago. See Att. F.

For the reasons set forth herein and in accordance with Rule 35 (b) FRAP Petitioner suggests the appropriateness of a rehearing in banc. Application in the court above for a Writ of Certiorari on the issue of the adjudication of the Chapter XI debtor (See order of Dec. 19, 1979 Att. F hereto) was not pursued in the hope that justice would be done in the instant appeal. It was not. The judicial brief in the earlier appeal in Docket 79-5052 stands uncontroverted.

The mounting evidence of extraordinary treatment of the Pioneer case lends increasing credibility to a requirement for rehearing in banc so that the issues be candidly addressed by the entire Second Circuit.

Accordingly, Petitioner prays that in accordance with Rules 25, 32a, 35(b) and 40 of the Federal Rules of Appellate Procedure that his petition and suggestion for rehearing in banc be granted.

Respectfully submitted,
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May 23, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

PIONEER WAREHOUSE CORPORATION,

Debtor 79-5052

ON APPEAL FROM THE US DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS OPENING BRIEF

MARSHALL P. SAFIR, Pro Se
Chief Executive and Sole
Stockholder of the Debtor.
271 Grand Central Parkway
Floral Park, New York 11005
212-225-0210

WANT OF PROSECUTION

The stated basis for the adjudication "want of prosecution" is clearly erroneous and a cynical perversion of the history of the case. There was no "want of prosecution" but instead a hasty foreclosure in September 1978 of Pioneers ability to prosecute so that Pioneer would be unable to reach the point where a successful plan of arrangement could be proposed.

The first roadblock to prosecution was successfully initiated by the letter from Carlton Asher Jr. Counsel to Paine Webber to Judge Hall resulting in the intervention of Chief Judge Mishler ordering the reassignment of the entire proceeding to a new judge at the 11th hour before the key remaining trials were to take place before Judge Hall. Judge hall was disinclined to interrupt the normal flow of the proceeding for this request. See Asher letter app. p. 44-46 Order of Judge Mishler's app. p. 47 Speciner protest letter app. p. 48-50 Judge Mishler's reply denying reconsideration app. p. 51.

In addition to the facts set forth above an exchange of correspondence between debtor Counsel, Counsel for the landlord and Judge Stanley Lesser of the Bankruptcy Court in the Southern District had taken place on September 8, 1978 and September 11, 1978. (see appendix p. 55-59) regarding a Pioneer asset of $135,000., the executory contract that was its genesis, and (by the landlord against Pioneer) an issue of specific performance in not perfecting certain assignments.

In spite of the position taken by Jules Speciner, Esq. in his letter of September 8, 1978 (See app. p. 56) he would not bring the issue of contempt before Judge Goetz at the September 29, 1978 meeting citing the Mishler order to Safir as complicating Pioneer's position and inhibiting such action. His termination was then requested by the debtor.

Judge Lessor soon there after granted the assignment of the Sapphire S.S. Lines claim. Whether he was informed Pioneer was temporarily without Counsel is unknown.

Appellant submits there was a direct relationship between the energetic and timely preparation for the September 15, 1978 trial of the Paine Webber issues, the landlord's adversary proceeding for September 29, 1978 and Debtors Counsel Speciner's militant letter to landlords counsel of September 8, 1978 by Carlton Asher, Esq. (Pane Webbers Counsel) to Judge Hall with a seemingly gratuitous copy to Chief Judge Mishler on the other.

The peremtory reassignment of the entire proceeding transformed debtors counsel. His unwillingness to press his contempt threat even after being directed to do so by the debtor was the direct consequence of the Chief Judge's peremtory order filed without notice. There after and for reasons never set forth Judge Goetz stated for the record that Jules Speciner, Esq. in being relieved of his duties as Counsel waived any fees for services rendered the debtor during the entire initial six months of the Chapter XI. The docket sheets (app. pages 67-74) attest to the magnitude of the work product of counsel. The letter by Speciner of October 5, 1978 on docket sheet (app. page 74) regarding affidavit and application for allowances is missing from the record on appeal.

Chief Judge Mishlers order, sua sponte, aborted the trials and had a delaying effect on the immediate and subsequent prosecution of the Chapter XI in that the order reassigned not merely the trial of the Paine Webber issue (which would have satisfied Ashers request) but the entire complex proceeding to a different judge with the delay inherent in the need to familiarize the new judge with the debtors problems.

Never the less, having come to the brink of trial with Paine Webber and having tested and determined their lack

of willingness to proceed (albeit admittedly unsettled by the circumstances of the postponement), Debtor appellant then turned its attention to the adversary proceeding with the landlord by engaging counsel who whould be most familiar with the issue at hand, Robert Rosen, Esq. who had successfully argued Queens Blvd. Wine & Liquor v. Blum, supra, was engaged on November 7, 1978 for this trial which was to be held on December 6 & 7, 1978.

Confronted once again, adversary counsel pleaded for delay. On November 28, 1978, landlords counsel moved for a delay of at least ninety days. See notice of motion and Affidavit of Stacy Wallach, Esq. Appendix p. 60-64.

Just as the outcome of the Paine Webber proceeding was necessary in the foundation of a plan so was the proceeding in respect to the landlord, in that the lease on the building was an asset which, if the Queens Blvd. principle was not upheld would have similarly affected the attitude of an investor in the chances for rehabilitation of the debtor. The admission in this remarkable Wallach affidavit coupled with "Weaver," "Fleetwood" and the Fifth Circuit opinion In the Matter of Fountainebleu Hotel Corp. 515 F 2d 913 (1975) and augmented by the new Bankruptcy Act of 1978 (See 11 USC 363 (1) 365 (b) (2) and 365 (e) which had been signed in to law were thought to be ample evidence that the landlord was preparing for settlement without trial. Mr. Rosen recommended that the debtor not oppose the motion.

In short the Paine Webber proceeding was then the significant outstanding issue and new evidence had come to the attention of the debtor that Paine Webber had abused process by conspiring to provoke Pioneer for ulterior legal purposes involving a third party see In the Matter of Emmanuel N.Y. County Supreme Court Special Term Part I Stecher, J. July 29, 1977 Appendix p. 54-55. This required a deposition of an officer of Paine Webber. Before the

Emmanuel issue was reached by Mr. Rosen, Mr. Rosen asked to be relieved as Counsel for the debtor without any explanation to the Court. In spite of the protest of the Chief Executive Officer of the debtor, Judge Goetz granted permission and further solicited application from Counsel for Paine Webber and the landlord, two contested creditors, the only adversary parties present, for a motion to dismiss the Pioneer case altogether. See Order & Notice of hearing. (See app. p. 65)

The denouement had begun. Want of Prosecution? Prosecution was not wanted. The real issues would not be allowed to surface and a viable business was to be legally destroyed in the very tribunal empowered by the Statute to protect it.

CONCLUSION

Wherefore debtor - appellant prays that this court reverse the order of adjudication and restore the appellant Corp. to its Chapter XI status pending trials of these adversary proceedings and the proposal and acceptance of a plan arrangement.

Respectfully submitted
MARSHALL P. SAFIR, Pro se

October, 1979